In forma pauperis
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 935

IN THE MATTER OF

JAMES M WRIGHT,

DEBTOR.

JAMES M. WRIGHT,

Petitioner and Appellant,

vs.

FIRST JOINT STOCK LAND BANK OF FORT WAYNE, ET AL.,

Respondents and Appellees.

BRIEF FOR RESPONDENT APPELLEE, FIRST JOINT STOCK LAND BANK OF FORT WAYNE IN OPPOSITION TO PETITION FOR CERTIORARI.

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   b. This appeal is in effect the second appeal from an order entered by the District Court on January 12, 1939. The appeal was filed on March 18, 1941, more than two years after the judgment was entered. Orders in bankruptcy proceedings not appealed within thirty days of the date of their rendition are final and cannot thereafter be appealed.

2. The Circuit Court of Appeals has not decided an important question of federal law in a way in conflict with the Acts of Congress or which should be settled by this court. The judgment entered by the Circuit Court of Appeals was an order of dismissal in response to a motion to dismiss filed by the respondent. * * * Each of the grounds set forth in said petition has been clearly recognized as an adequate ground for dismissal 14

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b. A frivolous appeal or one prosecuted for the purpose of delay will be dismissed.

c. A failure to file an appeal bond constitutes a ground for dismissal.

d. Where the decision appealed from has become moot the appeal will be dismissed.

e. Whether or not in a given case the Circuit Court of Appeals has properly exercised its discretion in dismissing an appeal where recognized grounds therefor are presented, is a question dependent upon the facts of the particular case and is not a matter of importance to the public. Certiorari will not be granted except in a case involving principles, the settlement of which are of importance to the public. Nor will the court grant a writ of certiorari to review the evidence or determine questions of fact.

f. The decision of the Circuit Court of Appeals having before it the grounds for dismissal above set out and the petitioner's persistent refusal to obey orders of the District Court, did not abuse its discretion in dismissing the appeal.

3. The decision of the Circuit Court of Appeals is not in conflict with the decisions of this court in the cases of *Borchard* v. *California,* 310 U. S. 311, *Kalb* v. *Feurstein,* 308 U. S. 433, *Hancock* v. *Bartels,* 308 U. S. 180, *Wright* v. *Union Central,* 311 U. S. 273..... 19

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BRIEF FOR RESPONDENT APPELLEE, FIRST JOINT STOCK LAND BANK OF FORT WAYNE IN OBJECTION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

In view of the total failure of the petitioner to file a transcript of the record and his further failure to include in his brief and petition a statement of the facts and the issues involved, and particularly in view of his omission of all mention of that portion of the prior record in this case in which he had filed a former appeal from the same

order and having lost in the Circuit Court of Appeals was denied certiorari by this Court, we believe we can best serve the Court by making an entire re-statement of the case.

While the petitioner filed no record to which reference can be made in this brief and no facts are set out in the opinion of the Circuit Court of Appeals since the order appealed from was its order of October 7, 1941 dismissing the appeal without opinion, nonetheless most of the facts and the record were before this Court in a prior appeal and can be found both in the prior opinion in the Circuit Court of Appeals (108 Fed. 2d 359) and in the briefs and record filed in this Court in connection with the petition for certiorari sought at that time (*James M. Wright* v. *First Joint Stock Land Bank of Fort Wayne,* No. 821, October Term, 1939, Cert. Denied, 310 U. S. 626).

This controversy involves a tract of land of eighty-two and one-half (82½) acres, formerly owned by the petitioner on which the respondent, First Joint Stock Land Bank of Fort Wayne, holds a mortgage executed January 30, 1922 in the original principal sum of $3,000.00. Despite the statements contained in the petitioner's brief and petition to the effect that the petitioner is here attempting to save his home, the petitioner does not now and never has lived on the farm in question. There were at the time the mortgage was executed, a farm house and other buildings on the property having a substantial value but the petitioner has permitted these to fall into such a state of disrepair as to be no longer habitable.

The petitioner stopped paying interest on the mortgage and taxes on the real estate in 1932 and has paid none since that date. In 1933 foreclosure proceedings were instituted in a state court but prior to the entry of judgment, a petition under Section 75 of the Bankruptcy Act was filed by the petitioner seeking a composition and ex-

tension of his debts. Conciliation failed and on December 12, 1934 a petition for adjudication under Section 75s was filed. A Trustee was appointed and the land was appraised at $1,910.00. In February, 1936, the Trustee leased the land to the petitioner for a two-fifths crop rental payable as the crops matured. The petitioner, who had at all times retained possession, both of the land here involved and of another two hundred acre farm owned by him and of the crops grown thereon, continued in possession under this lease and raised a crop for the year 1936 which was harvested in the Fall of that year. Despite frequent demands by the Trustee, the petitioner refused to deliver to the Trustee his two-fifths share of such crops and in June of 1937 the respondent, First Joint Stock Land Bank of Fort Wayne, filed its petition in said proceedings requesting a sale of the real estate by reason of the petitioner's failure to pay the rent and further requesting such other relief as the Court might deem just. Between the time of the filing of said petition and the time of the hearing thereon before a Special Master, the petitioner delivered to the Trustee his share of the crops for the year 1936. Following the hearing the Special Master filed his report recommending that the petitioner be permitted to remain in possession of the real estate but that he be required to pay the sum of $500.00 yearly upon the mortgage of the respondent. The petitioner filed exceptions to the Master's report and a hearing was held before the District Court in January, 1938 at which the Court did on January 15, 1938 enter its order confirming the report of the Special Master and directing the payment by the petitioner of $500.00 yearly.

A petition for rehearing was filed by the petitioner which was denied and no appeal was taken. The petitioner failed to pay the sums accruing under said order and on June 14, 1938 the respondent, First Joint Stock Land Bank of Fort Wayne, filed its petition in these proceedings request-

ing a sale of the real estate on which it held a mortgage by reason of the petitioner's failure to obey the prior order of the District Court, such relief being sought under the provision of Section 75s of the Bankruptcy Act which reads:

> "If, however, the debtor at any time fails to comply with the provisions of this Section or with any orders of the Court made pursuant to this Section, * * * the Court may order the appointment of a Trustee and order the property sold or otherwise disposed of as provided for in this Act."

The petitioner filed two paragraphs of answer to the petition alleging that the prior order of the Court directing the payment of $500.00 yearly was void because not supported by the evidence offered at said prior hearing, and praying that if the petition of the respondent for the sale of the land should be granted, the Court should order the land to be appraised and should order the land sold at the appraised value and should permit the petitioner to redeem the land from the sale within a reasonable time thereafter at the appraised value.

A hearing before a Special Master took place on June 29, 1938 at which the petitioner was present in person and by his attorney. Evidence was offered by the respondent showing the making of the prior order and the refusal of the petitioner to comply therewith. No objections to any of the evidence offered was made by the petitioner or his attorney and no evidence was offered by or on behalf of the petitioner, all evidence introduced being uncontradicted. The Master found that the petitioner had willfully refused to pay the sums directed to be paid by the Court in its order of January 15, 1938, that there was a balance due the respondent on its mortgage of $3,850.00, and that there were delinquent taxes against the real estate in an amount in excess of $400.00, and recommended that the land subject to the mortgage of the respondent be sold by a Trustee.

Although the petitioner had offered no evidence or other defense at the hearing, he filed exceptions to the report of the Special Master specifying twenty-eight alleged errors. The District Court on a hearing on the exceptions entered its special findings of fact and conclusions of law and thereupon entered its decree under date of January 12, 1939 approving the report of the Special Master, overruling the exceptions thereto and directing the appointment of a Trustee and the sale of the real estate. The petitioner then filed its petition for appeal in the Circuit Court of Appeals which was allowed by the District Court. This was followed by the petitioner's assignment of errors in which he set out thirty-three specifications of alleged errors with sixteen sub-points. These included the same errors as are specified in the present appeal.

On November 3, 1939 the Circuit Court of Appeals following oral argument entered its decision affirming the decision of the District Court (108 Fed. 2d 359) and on December 7, 1939 said Circuit Court of Appeals denied the appellant's petition for rehearing.

On December 18, 1939 the Circuit Court of Appeals issued its mandate to the United States District Court for the Northern District of Indiana affirming the judgment of said Court and directing further proceedings in accordance therewith. Thereafter the petitioner filed its petition with the Supreme Court of United States for a writ of certiorari, which petition was denied by the Supreme Court on May 6, 1940 (310 U. S. 626, 84 Law. Ed. 1397).

Wright then filed in the Supreme Court his petition for rehearing on his petition for certiorari asserting that the issues in this case were identical with those of *Wright* v. *Union Central Life Insurance Company* in which case certiorari had been granted by the Supreme Court on May 20, 1940 (310 U. S. 618, 84 Law. Ed. 1392). The petition for rehearing was denied on June 3, 1941 (310 U. S. 626, 84 Law. Ed. 1422).

Thereafter the Trustee appointed by the District Court in its order of January 12, 1939 advertised the real estate for sale in accordance with said order. Thereupon the petitioner filed a petition with the District Court entitled "Petition to Set Aside Void Order and Judgment in Said Cause", in which he sought to have the order of January 12, 1939 set aside as void and to enjoin the sale. The respondent filed its showing in opposition to said petition and after due hearing, the District Court on January 17, 1941 entered its order overruling the bankrupt's petition and directing the Trustee to proceed with the sale in accordance with the terms of the order of January 12, 1939 and of the mandate issued by the Circuit Court of Appeals. It is from this order that the bankrupt sought to prosecute the present appeal and we accordingly quote from this order as follows:

> "It is ordered, adjudged, and decreed that the motion of the bankrupt, James M. Wright, to set aside and hold void the order of this Court entered on January 12, 1939 and to restrain the Trustee from holding the sale as provided in said order be and the same is hereby denied. It is further ordered and decreed that said Trustee, R. F. Baird, Jr., be and he is hereby ordered and directed to proceed with the sale of the real estate described in said order of January 12, 1939 in accordance with the terms of said order and the mandate heretofore issued to the Court by the Circuit Court of Appeals for the Seventh Circuit."

In his appeal from this order the petitioner filed an assignment of errors setting out twenty-seven separate specifications of alleged errors in which he advanced the same grounds in support of his contention that the order of January 12, 1939 was void as were assigned by him in the prior appeal of that order. The petitioner did not file any appeal bond or supersedeas bond in connection with this appeal and accordingly the Trustee proceeded to sell the land in accordance with the District Court's prior

order, the land being sold to the respondent, First Joint Stock Land Bank of Fort Wayne, on March 19, 1941 and the sale being confirmed by the District Court on May 8, 1941. The petitioner has taken no appeal from the order of confirmation.

The respondent filed with the Circuit Court of Appeals its motion to dismiss the appeal in which it assigned the following grounds for dismissal:

> 1. The appeal in effect assigns as error on the part of the trial court only its action in obeying the mandate of the Circuit Court of Appeals issued in the prior appeal.
>
> 2. The former decision of the Court (108 Fed. 2d 359) became the law of the case and the appellants' remedy for avoidance thereof was by application for certiorari, which remedy he sought, the application being denied by the Supreme Court of the United States (310 U. S. 626).
>
> 3. The appeal appears on its face to be frivolous and moot.
>
> 4. The appellant failed to file any appeal bond.
>
> 5. The appeal has become moot by virtue of the Trustee's sale and confirmation thereof.

On October 7, 1941, after the matter had been fully briefed by both parties, the Circuit Court of Appeals in response to the motion to dismiss entered its order reading as follows:

> "On motion of counsel for the appellee, First Joint Stock Land Bank of Fort Wayne, it is ordered by the Court that this appeal be and it is hereby dismissed with costs."

It is to this order that the present petition for certiorari is addressed.

It should be noted that during all of this time up to the Fall of 1941, the petitioner remained in possession of the real estate and harvested the crops grown thereon each

year. Of the two-fifths share to which the Trustee was entitled, the Trustee collected his share for 1936 only after a petition for accounting had been filed by the respondent in June, 1937; he collected his share for the year 1938 only after a petition for accounting and a certificate of contempt had been filed by the respondent in June, 1939; the share of the 1939 crops has never been paid over or accounted for; and in 1941 despite the fact that the land had been sold on Court order the petitioner remained in possession, raised another crop and harvested approximately three-fifths thereof at which time the purchaser obtained a writ of assistance and secured possession, harvesting the balance of the crops itself.

REASONS WHY WRIT SHOULD NOT ISSUE.

I.

The petitioner by his complete disregard of the rules of this court and the statutes governing certiorari, has failed to present any questions for determination by this court.

a. The petitioner's failure to file any transcript of the record with his petition and within the time allowed, and his failure to include in his petition a statement of the facts involved (especially his omission of any reference to the prior appeal from the same order of the District Court) are in complete violation of the rules of this court and constitute grounds for denying the petition.

Rules of the Supreme Court No. 38 (2 & 3).

b. This appeal is in effect the second appeal from an order entered by the District Court on January 12, 1939. The appeal was filed on March 18, 1941, more than two years after the judgment was entered. Orders in bankruptcy proceedings not appealed within thirty days of the date of their rendition are final and cannot thereafter be appealed.

Section 25 of the Bankruptcy Act, U. S. C. A., Title 11, Par. 48.

Clements v. *Conyers*, 31 Fed. (2d) 563.

Shriener v. *Farmers Trust Co. of Lancaster*, 91 Fed. (2d) 606, certiorari denied, 302 U. S. 686, 82 L. Ed. 530.

II.

The Circuit Court of Appeals has not decided an important question of federal law in a way in conflict with the Acts of Congress or which should be settled by this court.

The judgment entered by the Circuit Court of Appeals was an order of dismissal in response to a motion to dismiss filed by the respondent. Each of the grounds set forth in said petition has been clearly recognized as an adequate ground for dismissal.

a. An appeal from a decree entered in conformity with a mandate and decision of the Circuit Court of Appeals in a prior appeal is without merit and will be dismissed.

Aspen Mining & Smelting Co. v. *Billings,* 150 U. S. 31, 37 L. Ed. 986.

Gaines v. *Caldwell,* 148 U. S. 228, 37 L. Ed. 432.

Metropolitan Water Co. v. *Kaw Valley Drainage District,* 223 U. S. 519, 56 L. Ed. 533.

Roberts v. *Cooper,* 61 U. S. 467, 15 L. Ed. 969.

Long Beach Dock & Terminal Co. v. *Pacific Dock & Terminal Co.,* 98 Fed. 2d 833, Certiorari denied, 305 U. S. 659, 83 L. Ed. 427.

Fisher v. *Bank of America,* 72 Fed. 2d 635.

b. A frivolous appeal or one prosecuted for the purpose of delay will be dismissed.

Wagner Electric Mfg. Co. v. *Lyndon,* 262 U. S. 226, 67 L. Ed. 961.

c. A failure to file an appeal bond constitutes a ground for dismissal.

Rules of Civil Procedure No. 73 (a) and (c).

d. Where the decision appealed from has become moot the appeal will be dismissed.

Pease et al. v. *Rathbun-Jones Eng. Co.,* 228 Fed. 273.

(Affirmed on other grounds 243 U. S. 273, 61 L. Ed. 715.)

e. Whether or not in a given case the Circuit Court of Appeals has properly exercised its discretion in dismissing

an appeal where recognized grounds therefor are presented, is a question dependent upon the facts of the particular case and is not a matter of importance to the public. Certiorari will not be granted except in a case involving principles, the settlement of which are of importance to the public.

Layne & Bowler Corp. v. *Western Well Works,* 261 U. S. 387.

Nor will the court grant a writ of certiorari to review the evidence or determine questions of fact.

U. S. v. *Johnson,* 268 U. S. 220.

f. But in any event the Circuit Court of Appeals having before it the grounds for dismissal above set out and the petitioner's persistent refusal to obey orders of the District Court, did not abuse its discretion in dismissing the appeal.

III.

The decision of the Circuit Court of Appeals is not in conflict with the decisions of this court in the cases of *Borchard* v. *California,* 310 U. S. 311, *Kalb* v. *Feurstein,* 308 U. S. 433, *Hancock* v. *Bartels,* 308 U. S. 180, *Wright* v. *Union Central,* 311 U. S. 273.

IV.

The petitioner has from the beginning of the bankruptcy proceedings utilized the Frazier-Lemke Act, not as a means of rehabilitating himself but rather as an instrument to delay payment of his just debts.

ARGUMENT.

The petition for certiorari and supporting brief gives a wholly erroneous picture of the issues presented by the decision of the Circuit Court of Appeals in this case. The petitioner purports to believe that the issues presented involve the propriety of the original order of sale and the debtor's right of redemption. These questions were presented and finally decided in the prior appeal of this case and this court denied certiorari with respect thereto. Accordingly, that decision became the law of the case and it is no longer open to review. The present petition for certiorari is addressed to an order of the Circuit Court of Appeals dismissing the appeal on motion of the respondent. Four reasons were advanced by the respondent in its motion to dismiss as ground for such dismissal and if any of said grounds is a proper basis for dismissal then the decision of the Circuit Court of Appeals is correct and the petition for certiorari is without merit. Accordingly, we believe that there are two issues which this court is called upon to decide in considering the petition for certiorari. One, has the petitioner properly presented any questions for review by this court? Two, was any of the grounds for dismissal advanced by the respondent in its motion to dismiss filed with the Circuit Court of Appeals sufficient to support the order of dismissal entered by that court?

I.

The Petitioner by His Complete Disregard of the Rules of This Court and the Statutes Governing Certiorari Has Failed to Present Any Questions for Determination by This Court.

The petitioner has made no effort whatever to comply with the rules of this court with respect to the preparation of briefs and filing of petitions for certiorari. Rule 38 requires that a certified transcript of the record be filed along with the petition. The petitioner filed no record and has made no effort to obtain one. He waited until the ninety day period had all but expired and then obtained an extension of thirty days for filing his petition and filed it on the day that the extended period expired. If he was unable to pay the cost of a transcript, it was open to him to apply for the right to appeal as a pauper. However, this should have been done in ample time to permit the filing of the original typewritten transcript along with the petition for certiorari. This procedure is well known to the petitioner since he followed it in the prior appeal of this case (*James M. Wright* v. *First Joint Stock Land Bank*, No. 821 October Term, 210 U. S. 618). Nor has the petitioner made any effort to comply with other rules of this court prescribing the form of briefs and petitions for certiorari. His statement of facts is wholly inaccurate and misleading and is composed largely of argument. Under Rule 38 the breach of these rules is a sufficient ground for denying the writ.

Even more serious than his violation of the rules of this court is the petitioner's failure to comply with the provisions of Section 25 of the Bankruptcy Act, U. S. C. A. Title 11, Paragraph 48, which provides:

> "Appeals under this title (in bankruptcy) to the Circuit Courts of Appeals of the United States shall be taken within thirty days after written notice to the

aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service, or if such notice be not served and filed, then within forty days from such entry."

The present appeal is in effect a second appeal from an order entered by the District Court on January 12, 1939. The appeal was filed on March 18, 1941, more than two years after the entry of the judgment appealed from. It is true that the petitioner purports to be appealing from an order of a District Court entered on February 17, 1941. However, the order of February 17th was simply a denial of the petitioner's motion to declare the order of January 12, 1939 void and a direction to the trustee to proceed with the sale in accordance with the order of January 12, 1939. If such a motion and order can revive the right of appeal, then the statute above referred to becomes meaningless and the number of appeals and the time within which they may be filed would be extended indefinitely. That the provisions of said Section 25 of the Bankruptcy Act apply to appeals in proceedings under Section 75-S has been decided by the case of *Shriener* v. *Farmers Trust Co.*, 91 Fed. 2d 606, certiorari denied 302 U. S. 606.

II.

The Circuit Court of Appeals Has Not Decided an Important Question of Federal Law in a Way in Conflict With the Acts of Congress or Which Should Be Settled by This Court. The Judgment Entered by the Circuit Court of Appeals Was an Order of Dismissal in Response to a Motion to Dismiss Filed by the Respondent. Each of the Grounds Set Forth in Said Motion Has Been Clearly Recognized as an Adequate Ground for Dismissal.

As indicated by the statement of facts at the beginning of this brief, the present appeal is taken from an order entered by the District Court on February 17, 1941, in

which the court refused to set aside and hold void a prior order entered by it on January 12, 1939, directing the appointment of a trustee and the sale of the real estate on which the respondent holds a mortgage. The prior order of January 12, 1939 had been affirmed in an earlier appeal and a mandate had been issued by that court directing further proceedings in accordance with the decision. The petition for certiorari filed by the bankrupt seeking a review of such prior decision was denied by the Supreme Court of the United States on May 20, 1940 (310 U. S. 626, 84 L. Ed. 1392).

Accordingly, the present appeal is in effect a second appeal from the same order of the District Court which had already been affirmed in the prior appeal. This was the first reason advanced for dismissal by the respondent in its motion filed in the Circuit Court of Appeals. The rule is well established that such an appeal will not be permitted and will be dismissed. Without burdening the court with excerpts from each of the cases cited in our Reasons Why the Writ Should Not Issue in this brief, we are quoting excerpts from a few of the cases as being typical of the decisions on this point:

In the case of *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 37 L. Ed. 986, the appellant sought to take an appeal from the decision of the Circuit Court (now District Court) carrying out a mandate from the United States Circuit Court of Appeals entered in a prior appeal in the case. In dismissing the appeal, the Supreme Court stated:

> "Apart from these considerations, however, this is an appeal from a decree entered by the Circuit Court in conformity with the mandate from the Circuit Court of Appeals for the Eighth Circuit. That court took jurisdiction, passed upon the case, and determined by its judgment that the appeal had been properly taken. If error was committed in so doing, it was not for the circuit court to pass upon that question. The circuit

court could not do otherwise than carry out the mandate from the court of appeals, and could not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court. *Skillern* v. *May,* 10 U. S. 6 Cranch, 267 (3:200); *Re Washington & G. R. Co.,* 140 U. S. 91 (35:339); *Gaines* v. *Caldwell* (*"Gaines* v. *Rugg"*), 148 U. S. 228, 241 (37:432, 436). And a decree entered by the court below in accordance with the mandate of the appellate court, cannot be maintained. *Stewart* v. *Salamon,* 97 U. S. 361 (24:1044); *Humphrey* v. *Baker,* 103 U. S. 736 (26:456); *Texas & P. R. Co.* v. *Anderson,* 149 U. S. 237 (37:717). If the circuit court of appeals erred, or if, for any reason, its judgment could be held void, the appropriate remedy lay in a certiorari from this court to that court. *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.,* 148 U. S. 372 (37:486). And we judicially know from our own records (*Butler* v. *Eaton,* 141 U. S. 240) 243 (35:713, 714) that the present appellants applied to this court for that writ, and that the application was denied."

Appeal dismissed.

In the case of *Long Beach Dock and Terminal Co.* v. *Pacific Dock and Terminal Co.,* 98 Fed. 2d 833 (Certiorari denied, 305 U. S. 659, 83 L. Ed. 427) a decree adverse to the plaintiff had been entered by the trial court which was thereafter reversed by the Circuit Court of Appeals, and the case was remanded for further proceedings not inconsistent with the opinion. The trial court complied with the mandate and the defendant sought an appeal from this order. The plaintiff moved to dismiss the appeal upon the ground that:

> "The appeal in effect assigns as error on the part of the trial court only its action in obeying the mandate of the Circuit Court of Appeals on the prior appeal."

In granting the motion to dismiss, the court stated:

> "The motion is well founded. The sole question attempted to be raised on this appeal is whether our

> decision on the former appeal was right or wrong. Appellant contends that it was wrong, and that, therefore, our mandate was wrong and should not have been obeyed. That the mandate was obeyed, and that the decree was in conformity therewith is conceded. Thus the decree was, in effect, our decree, and the present appeal is 'from ourselves to ourselves.' *Stewart* v. *Salamon,* 97 U. S. 361, 362, 24 L. Ed. 1044. Such an appeal will not be entertained. (Citing numerous cases.) Appeal dismissed."

The reasons for the rule announced in these cases is of course obvious. It is essential that there be some point at which litigation will definitely end and that the time of the courts shall not be consumed with futile and frivolous cases seeking a rehearing of matters already determined by the court. As stated by the Supreme Court in the case of *Roberts* v. *Cooper,* 61 U. S. 467, 15 L. Ed. 969:

> "There would be no end to a suit if every obstinate litigant could by repeated appeals compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members."

And this rule holds good even though the losing party may feel that a subsequent decision of the Supreme Court has changed the law. To quote from the case of *Gaines* v. *Caldwell,* 48 U. S. 228, 37 L. Ed. 432:

> "As to the suggestion that the views adopted by this court in its decision in *McDonald* v. *Belding,* 145 U. S. 492 (36:788) decided by this court after the present cases were decided, would, if applied to the present cases, have caused a different result in them, we are of the opinion that, without conceding that such would have been the result, this court cannot on well established rules and principles, permit the Circuit Court, of its own motion, to go back of, or subvert what was settled by the opinion and mandate in the present cases."

A second reason advanced by the respondent for a dismissal of the appeal was that the appeal appeared on its

face to be frivolous and prosecuted for the purpose of delay. That such an appeal should be dismissed was decided by this court in the case of *Wagner* v. *Lyndon,* 262 U. S. 226, 67 L. Ed. 961. In the instant case the petitioner has sought to raise the same issues as were raised and decided in the prior appeal. This in itself would render the appeal frivolous and indicate that its only purpose was to gain time during which the petitioner would remain on the farm and grow crops thereon.

A third reason for dismissal contained in respondent's motion related to the failure of the petitioner to file any appeal bond or cost bond in connection with his appeal. Under the provisions of Rule 72 and 73 (c), such a bond is required in all cases. Under the provisions of Rule 73 (a) the failure of appellant to take such step is, when no other remedy is specified, grounds "for such action as the Appellate Court deems appropriate, which may include the dismissal of the appeal."

The fourth reason advanced by appellant in its motion to dismiss was that the issues sought to be raised had become moot. The appeal was from an order refusing to set aside as void a prior order of the District Court directing sale of certain real estate and refusing to enjoin the trustee from holding such sale. No supersedeas bond was filed pending the appeal and the trustee in accordance with the court's order conducted the sale and sold the real estate. The sale was confirmed by the District Court. The petitioner excepted to the order of confirmation but did not appeal therefrom. Under these circumstances further litigation seeking to enjoin this sale or the enforcement of the order providing for such sale would be futile and the questions sought to be raised by the appeal have become moot. See *Pease* v. *Rathbun-Jones Eng. Co.,* 228 Fed. 273, affirmed on other grounds 243 U. S. 273, 61 L. Ed. 715.

Since each of the above grounds has been recognized as

an adequate basis for dismissing the appeal, and since the order of the Circuit Court of Appeals dismissing the appeal was correct if any one of the grounds enumerated was sufficient, it is respectfully submitted that the petition for certiorari is without merit and should be denied.

III.

The Decision of the Circuit Court of Appeals Is Not in Conflict With the Decisions of This Court in the Cases of Borchard v. California, 310 U. S. 311, Kalb v. Feurstein, 308 U. S. 433, Hancock v. Bartels, 308 U. S. 180, Wright v. Union Central, 311 U. S. 273.

Since none of the above cases involved a dismissal of an appeal on any of the grounds resulting in the dismissal of this case by the Circuit Court of Appeals, it is evident that none of them could or did decide any questions having a bearing on the present case.

The Borchard case involved the right of a state court to continue foreclosure proceedings after the filing of a petition under Section 75-S of the Bankruptcy Act. In the Kalb case this court held that the filing of proceedings under Section 75 of the Bankruptcy Act acts as an automatic stay of all proceedings in state courts involving the bankrupt's property and that the state court had no jurisdiction to confirm a Sheriff's sale of the bankrupt's farm after the filing of the bankruptcy proceedings. In the case of *Hancock* v. *Bartels*, the court held that inability of the farmer debtor to rehabilitate himself during the moratorium period was not a ground for dismissing the petition. The Union Central case involved the right of the farmer debtor to redeem at the appraised value when application therefor was seasonably made prior to the entry of an order of sale.

It may be noted that each of the above cases, with the

exception of the Union Central case, was cited by the petitioner in his petition for certiorari in the first appeal of this case. The Union Central case had not then been decided. However, the history of that case as related to the present one is significant. Both cases arose in the same proceedings but involved different mortgagees and different parties. The orders of sale entered in the two cases were based upon entirely different sets of facts and were entered at different hearings. The appeals were prosecuted at approximately the same time and the Circuit Court of Appeals handed down its decision in both cases on the same day. The petitions for certiorari were likewise filed in this court and considered by it at approximately the same time. The petition for certiorari in the instant case was denied by the Supreme Court on May 6, 1940, 310 U. S. 626, 84 L. Ed. 1397. The petition for certiorari in the Union Central case was granted by the Supreme Court on May 20, 1940, 310 U. S. 618, 84 L. Ed. 1392. Thereupon the bankrupt filed with the Supreme Court a petition for rehearing of his petition for certiorari in the instant case, alleging that the issues in this case and in the Union Central case were identical. The petition for rehearing was denied by the Supreme Court on June 3, 1940, 310 U. S. 626, 84 L. Ed. 1422. It is evident that under this state of the record the decision in the Union Central case is not and was not regarded by the Supreme Court as controlling the decision in the instant case even on the first appeal. The grounds of distinction are even stronger with respect to the present appeal for the reason that the Union Central case did not involve any question concerning the right of the Circuit Court of Appeals to dismiss an appeal, which is the sole question presented in the instant case.

IV.

The Petitioner Has From the Beginning of the Bankruptcy Proceedings Utilized the Frazier-Lemke Act, Not as a Means of Rehabilitating Himself, But Rather as an Instrument to Delay Payment of His Just Debts.

The petitioner has had the presumption to imply that the District Court and the Circuit Court of Appeals in this case went out of their way to prevent the bankrupt from exercising rights granted him under the provisions of Section 75-S of the Bankruptcy Act. In Paragraph 3 of his petition he states:

> "This contest was carried on since October 30, 1934, and the court never would enter such an order. The record will show every possible way was tried but the court every time would think of something to keep from making such order."

and in Paragraph 4 he states:

> "We regret to say the record will show that instead of finding some way in the Act to aid this farmer, the court always found some excuse for refusing to enforce the Act or some reason for denying him of the benefits of the Act."

We believe the record will show on the contrary that every leniency was extended to the petitioner but that from the commencement of the proceedings he has constantly shown that his object was not to rehabilitate himself but rather to utilize the Frazier-Lemke Act as a means of avoiding payment of his just debts. The petitioner has been in possession of the land since the commencement of the proceedings in 1934, as well as for many years prior thereto. He has paid no taxes and no interest on the mortgage since 1932. He has permitted the buildings on the land to fall into such a state of disrepair as to be no longer habitable. Despite the provisions of the Frazier-Lemke Act and of the

lease between the petitioner and the trustee, the petitioner consistently refused to pay to the trustee his crop rental except after a petition for accounting or a certificate for contempt had been filed by the respondent. The 1936 crop was paid in June of 1937 after the filing of such a petition. The 1938 crop was paid in June of 1939 after the filing of such a petition. The 1939 crop has never been accounted for. About three-fifths of the 1941 crop was harvested and retained by the petitioner long after the property had been sold and the sale confirmed, and the balance of the crop was harvested by the purchaser only after a writ of assistance had been issued. The petitioner has, as found both by the Special Master and the trial court, willfully refused to pay any portion of the yearly sums which he was ordered to pay on the mortgage of respondent despite the fact that each year he has received at least three-fifths of the crops grown on this farm as well as on another farm of 200 acres likewise involved in the bankruptcy proceedings. Moreover, the petitioner has consistently contested every order made as a result of his disobedience of prior orders, and in each case has rendered necessary a hearing before a Special Master, a hearing before the District Court on objections to the Special Master's report, and an appeal to a higher court. By this means he has greatly increased the costs in the way of trustee's costs, Special Master's fees, and fees of the trustee's attorneys, chargeable against the two-fifths share of the crops paid to the trustee. In short, he has sought from the beginning to take for himself all of the benefits granted by the Act and to assume none of its burdens, and has sought to extend the time within which he might pursue this course by prolonged and needless litigation. We submit that this course of procedure should now be terminated by the denial of the writ of certiorari and that further loss should not be imposed upon the respondent.

WHEREFORE, respondent respectfully submits that for the reasons above set forth the writ of certiorari should be denied.

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